

FILED

MAY 17 2013

No. 314448

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

**STATE OF WASHINGTON COURT OF APPEALS
DIVISION THREE**

NORMA ADAMS,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES

Respondent

APPELLANT'S OPENING BRIEF

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I.	ASSIGNMENT OF ERROR.....	1
II.	STATEMENT OF ISSUES.....	1
III.	FACTS.....	2
IV.	ARGUMENT.....	4
V.	CONCLUSION.....	12

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

Bennett v. Dept. Of Labor and Indust., 95 Wn. 2d 531, 627 P.2d 104 (1981)5

Bitzan v. Parisi, 88 Wn.2d 116, 558 P.2d 775 (1977).....5

Dennis v. Dep't of Labor and Indus., 109 Wn.2d 467 (1987).....6

Du Pont v. Dep't of Labor & Indus., 46 Wash.App. 471, 730 P.2d 1345 (1986)4

Eastwood v. Dep't. of Labor and Indus., 219 P.3d 711 (2009)4

Harbor Plywood Corp. v. Dep't of Labor and Indus., 49 Wn.2d 553 (1956).....6

In Re: Iris R. Vandorn, Docket No. 02 11466 (2003).....8

Miller v. Dept of Labor and Indust., 200 Wash. 674, 94 P.2d 764, (1939).....6

Ray v. Dep't of Labor and Indus., 177 Wash. 687 (1934)6

Wendt v. Dept. of Labor & Indus., 18 Wn.App. 674, 571 P.2d 229 (1977).....5

WASHINGTON STATE COURT RULES

ER 20110

WASHINGTON STATE STATUTES

RCW 51.....4

RCW 51.52.140.....4

I. ASSIGNMENT OF ERROR

ASSIGNMENT OF ERROR NUMBER 1: The trial court misapplied the law with regard to proximate causal relationship of conditions related to an industrial injury.

ASSIGNMENT OF ERROR NUMBER 2: The trial court misapplied the law with regard to Ms. Adams' motion for judicial notice.

II. STATEMENT OF ISSUES

1) Whether the trial court misapplied the law with regard to conditions contended to be causally related to the industrial injury when those conditions were subsequent compensable consequences of that industrial injury, and testimony of both Ms. Adams' doctor and Department doctors back-up the fact that the conditions were rendered symptomatic.

2) Whether the trial court erred by denying Ms. Adams' motion for judicial notice when the document in question was authored by, and available from the Washington State Department of Labor and Industries, the responding party to this matter.

III. FACTS

Closing arguments in this matter were heard by the Honorable Judge Gregory Sypolt on December 13, 2012. *See Clerk's Papers 29-32*. A statement of this case is as follows.

On July 23, 1986, Ms. Adams was working as a flagger on a construction project on Interstate 5 in Western Washington. *See Administrative Record 36*. She was moving a sign and running across the freeway when she suddenly felt excruciating pain in the calf of her left leg. *Id.* She was taken to the hospital in Vancouver, WA, and was told she had ruptured the calf muscle in her left leg. *Id.* Ms. Adams testified that at the time of the accident, she did not have any pain in her back, hip, neck, shoulder, or any symptoms of bilateral carpal tunnel syndrome. *See Admin (Testimony of Norma Adams at 12-16)*.

Ms. Adams testified she still has problems with her left leg. *See Admin (Testimony of Norma Adams at 22-23)*. It will occasionally "give out" causing her to fall. *Admin 27*. On more than one occasion, the falls have resulted in Ms. Adams seeking further treatment in an emergency room. *Id.*

After the industrial injury, Ms. Adams continued working in construction as a flagger from 1986 until 1991, when she could no longer work due to pain. *Id.* Sometime after 1991, the Department determined

that Ms. Adams should be retrained to work as a cashier. *Id.* As part of the retraining, Ms. Adams was working at the Goodwill store in Spokane. *Id.* While working at the store, Ms. Adams fell off the stool she was sitting on and she testified she injured her neck, left shoulder, left hip, and back. *Id.* This happened on or about March 23, 1994. *Id.* While undergoing vocational testing on or about May 24, 2000, Ms. Adams suffered another fall that resulted in her seeking further treatment in the emergency room. *Admin 27-28.*

The Department later attempted to retrain Ms. Adams to work in business management. *Admin 28.* She took classes at Spokane Community College's branch campus in Colville, WA, in 2000 and 2001. *Id.* The classes required Ms. Adams to perform extensive typing on a computer keyboard. *Id.* She started noticing her hands would get numb and the numbness and tingling would wake her up at night. *Id.* According to Ms. Adams, she took classes for approximately two years but did not obtain a degree because she was unable to pass the final testing due to pain in her hands, wrists, and leg. *Id.* The retraining ended sometime in 2001. *Id.*

IV. ARGUMENT

1) The trial court misapplied the law with regard to proximate causal relationship of conditions related to an industrial injury.

“Review in this court is controlled by RCW 51.52.140, which provides, in part, that ‘[a]ppeal shall lie from the judgment of the superior court as in other civil cases.’ In reviewing the superior court’s decision, the role of the Court of Appeals is to determine whether the court’s findings are supported by substantial evidence and whether those findings support the conclusions of law.” *Eastwood v. Dep’t. of Labor and Indus.*, 219 P.3d 711 (2009) (citing *Du Pont v. Dep’t of Labor & Indus.*, 46 Wash.App. 471, 476-77, 730 P.2d 1345 (1986)).

This Court will find that the evidence presented to the Board of Industrial Insurance Appeals (Board) and the superior court was substantial, and in favor of Ms. Adams when applied to the law. The first legal precedent overlooked by the superior court was that of proximate cause with respect to latent conditions having been “lighted up” by the industrial injury.

In Judge Emmingham’s PD&O dated January 25, 2012, (PD&O 1/25/12) is a poignant overview of the rules of proximate causation under RCW title 51.

Washington adheres to the proximate cause rule.

For a condition or disability to be compensable, the industrial injury must be a proximate cause. In the context of an Industrial insurance case, a “proximate cause” is a “cause in fact.” Proximate cause is determined by application of the “but for” test. A “proximate cause” is one “without which” the condition or disability complained of would not have occurred.

Admin 32 (citations omitted).

The law does not require that the industrial injury be the sole proximate cause of such condition. *Wendt v. Dept. of Labor & Indus.*, 18 Wn.App. 674, 571 P.2d 229 (1977).

Further, the Supreme Court of Washington states:

It is not always necessary, however, to prove every element of such causation by medical testimony. If, from the facts and circumstances and the medical testimony given, a reasonable person can infer that the causal connection exists, the evidence is sufficient. This rule is in harmony with our holding in *Bitzan v. Parisi*, that lay witnesses may testify to such aspects of physical disability of an injured person as are observable by their senses and describable without medical training, and further that an injured person can testify regarding the subjective aspects of an injury and to the limitations of his physical movements.

Bennett v. Dept. Of Labor and Indust., 95 Wn. 2d 531, 533-34, 627 P.2d 104 (1981) (citations omitted).

Further elucidating the concept of causation is the law regarding the “lighting up” of a latent condition, or an

injury which makes an asymptomatic condition become symptomatic.

If the accident or injury complained of is the proximate cause of the disability for which compensation is sought, the previous physical condition of the workman is immaterial and **recovery may be had for the full disability independent of any preexisting or congenital weakness**; the theory upon which that principle is founded is **the workman's prior physical condition is not deemed the cause of the injury, but merely a condition upon which the real cause operated.**

Miller v. Dept of Labor and Indust., 200 Wash. 674, 683, 94 P.2d 764, 768 (1939) (citations omitted) (emphasis added).

The Washington Supreme Court further expounds on the concept of light up by stating that “where a sudden injury ‘lights up’ a quiescent infirmity or weakened physical conditions occasioned by disease, the resulting disability is attributable to the [industrial] injury and compensation is awardable.” *Dennis v. Dep’t of Labor and Indus.*, 109 Wn.2d 467 at 472 (1987) (citing *Harbor Plywood Corp. v. Dep’t of Labor and Indus.*, 49 Wn.2d 553 (1956) and *Ray v. Dep’t of Labor and Indus.*, 177 Wash. 687 (1934) (preexisting dormant arthritic conditions lighted up and made active by injury)).

Here there is both medical and lay testimony through Dr. Merle Janes, Ms. Adams’ Attending Physician of twelve years, and Pamela Graever,

Ms. Adams' daughter, who knew her before, during, and after the industrial injury and subsequent falls during vocational services. *See Admin (Testimony of Merle Janes and Pamela Graver)*. The testimony clearly establishes a lighting up of preexisting asymptomatic conditions, and therefore proximate causation to the industrial injury. *Id.* Causal relation is also apparent by way of the accepted condition causing Ms. Adams to fall during vocational retraining, maintain an altered gait for multiple years, and suffer complications of the above-referenced conditions as a direct result of the industrial injury. *Id.* Further, every doctor testifies that the industrial injury did not cause the degenerative conditions, but every doctor also testifies that the degenerative conditions were asymptomatic prior to the industrial injury. *See generally Admin (Testimony of Dr. Janes at 26, 65-68, 71, 74-77, 79, 85-87; Dr. James at 22, 23, 27, 50; Dr. Fossier at 30; Dr. Hong at 65-74)*. Each doctor states the first onset of the conditions becoming symptomatic was after either the industrial injury, or the falls suffered due to the accepted condition and while the injured worker was actively participating in vocational services through the Department. *Id.* According to the long-standing precedent of the Industrial Insurance Act, if a subsequent condition is traceable to the original industrial injury, that condition is compensable, or covered, by the Department of Labor and Industries.

The compensable consequence doctrine is discussed in 1 Larson's Workers' Compensation Law, § 10.07 (2002). The doctrine is usually applied in situations where a worker who is required to attend a medical appointment as a part of the administration of a claim, is injured on the way to or from the medical appointment. As Larson notes, the general rule is that such injuries are sufficiently causally connected to the original injury so as to be compensable consequences of the original compensable injury.

In Re: Iris R. Vandorn, Docket No. 02 11466 (2003).

While not binding at the Court of Appeals, this published significant decision of the Board outlines exactly the way the Act has been interpreted. In *Vandorn*, the injured worker had an open and active industrial insurance claim, and was on her way to an appointment with the vocational counselor assigned to her by the Department of Labor and Industries when her vehicle “veered from its lane of travel, crossed the centerline of the roadway, and struck an on-coming bus. She sustained severe injuries as a result of this collision.” *Id.* at 2. The Board allowed for Ms. Vandorn’s severe injuries to be compensable and accepted as part of her claim because they were consequences of a previously compensable injury; she would not have been on the road travelling at that time and place if were not for the underlying industrial injury and the vocational meeting set for her by the Department. Further, the Board in *Vandorn* found that there is “no distinction between a trip to a required vocational

appointment and a required medical appointment when applying this doctrine.” *Id.* at 3.

Ms. Adams fell off of her stool twice at required vocational training sessions and therefrom, suffered significant cervical neck, hip, lumbar back, and shoulder symptoms, none of which she had suffered from before. *Admin 27*. Even the Department’s hired medical examiners testified to the fact that nowhere in Ms. Adams’ records were complaints of these symptoms until after these falls. *See Admin (Testimony of Dr. Hong at 65-73)*. Another of the Department’s hired examiners provides medical testimony of evidence, compared both before and after one of these falls, showing an objective worsening of Ms. Adams’ back. Further testimony of this doctor shows also Ms. Adam’s latent cervical neck condition was rendered symptomatic after the 1994 fall. *See Admin (Testimony of Dr. Fossier at 70-71, 77-78)*.

Similarly, with respect to the condition of bilateral carpal tunnel syndrome (CTS), the testimony of Drs. Fossier, Hong, and Jennifer James, all state that Ms. Adams’ diabetes placed her in a state predisposed to acquiring CTS. *See Admin (Testimony of Dr. Hong at 43, 45, and Dr. James at 19, 58, 70)*. Another condition that while potentially preexisting, was not symptomatic until after extensive keyboarding performed during vocational training. *See Admin 28*. It is clear, and in line with Dr. Janes’

testimony, that “but for” the keyboarding this condition would have either not become symptomatic, or the keyboarding at least intensified and sped up the onset of symptoms. *See Admin 29, Admin (Testimony of Dr. Janes at 53-55, 76-77, 79, 81, 85-87).*

These facts were overlooked by the superior court, and produced a legally incorrect result.

2) The trial court misapplied the law with regard to Ms. Adams’ motion for judicial notice.

ER 201(b) states “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Subsection d of *ER 201* makes mandatory that “a court shall take judicial notice if requested by a party and supplied with the necessary information.” This document was created by the Department of Labor and Industries, a party to the matter, for the purpose of helping doctors diagnose CRPS. It can be found on the Department’s website and is readily verifiable as accurate and originating from the Department itself, and copies were also provided to IIAJ Emmingham and opposing counsel, thoroughly satisfying both *ER 201(b)* and *ER 201(d)*. *See Admin 26.*

It is helpful to note that one of this document's "primary goals is to provide standards that ensure high quality of care for injured workers in Washington State." *Admin (Work-Related Complex Regional Pain Syndrome (CRPS): Diagnosis and Treatment*, at 2).

The Proposed Decision and Order (PD&O) authored by IIAJ Emmingham improperly addresses the diagnosis of CRPS given the fact that the department's own document entitled "Work-Related Complex Regional Pain Syndrome (CRPS): Diagnosis and Treatment" was not given judicial notice. This document effectively gives a color-by-number guideline for diagnosing CRPS. The sum and substance of this guideline requires that in order for an injured worker to have a proper diagnosis of CRPS, she must display certain symptoms from subjective, objective, and diagnostic categories. All categories in the case of Ms. Adams are met, and readily discernible in the cumulative testimony.

This misapplication of law and error made at the lower court level can be effectively corrected at the appeal level, if this court will reverse the ruling by the BIIA, and take judicial notice of this document, created by a party to this matter, and proffered by that party as the preferred way of dealing with Complex Regional Pain Syndrome, a material issue of contention between the parties here. A copy of the document is included.

V. CONCLUSION

For the reasons above, Ms. Adams respectfully requests this Court overturn the Proposed Decision and Order of Industrial Appeals Judge Emmingham dated January 25, 2012, which was upheld at the superior court level.

Originally Submitted April 29th, 2013.

Respectfully Re-submitted
this 17th day of May, 2013.



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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

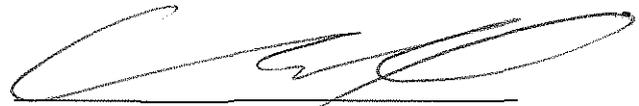
State of Washington)	COA No. 314448
Respondent,)	
v.)	Spokane Cty. Sup. Ct. No. 122015184
)	
Norma Adams,)	Declaration of Service
Appellant)	

I DECLARE, that my name is Christopher S Carlisle, attorney with Stiley and Cikutovich, PLLC, I am and at all times hereinafter mentioned, a citizen of the United States and a resident of Spokane County, Washington, over the age of eighteen years, and that on 05-17-13, I mailed a copy of Appellant's Opening Brief, corrected, relevant to the above-entitled matter, to the following parties:

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Dated 5/17/2013


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